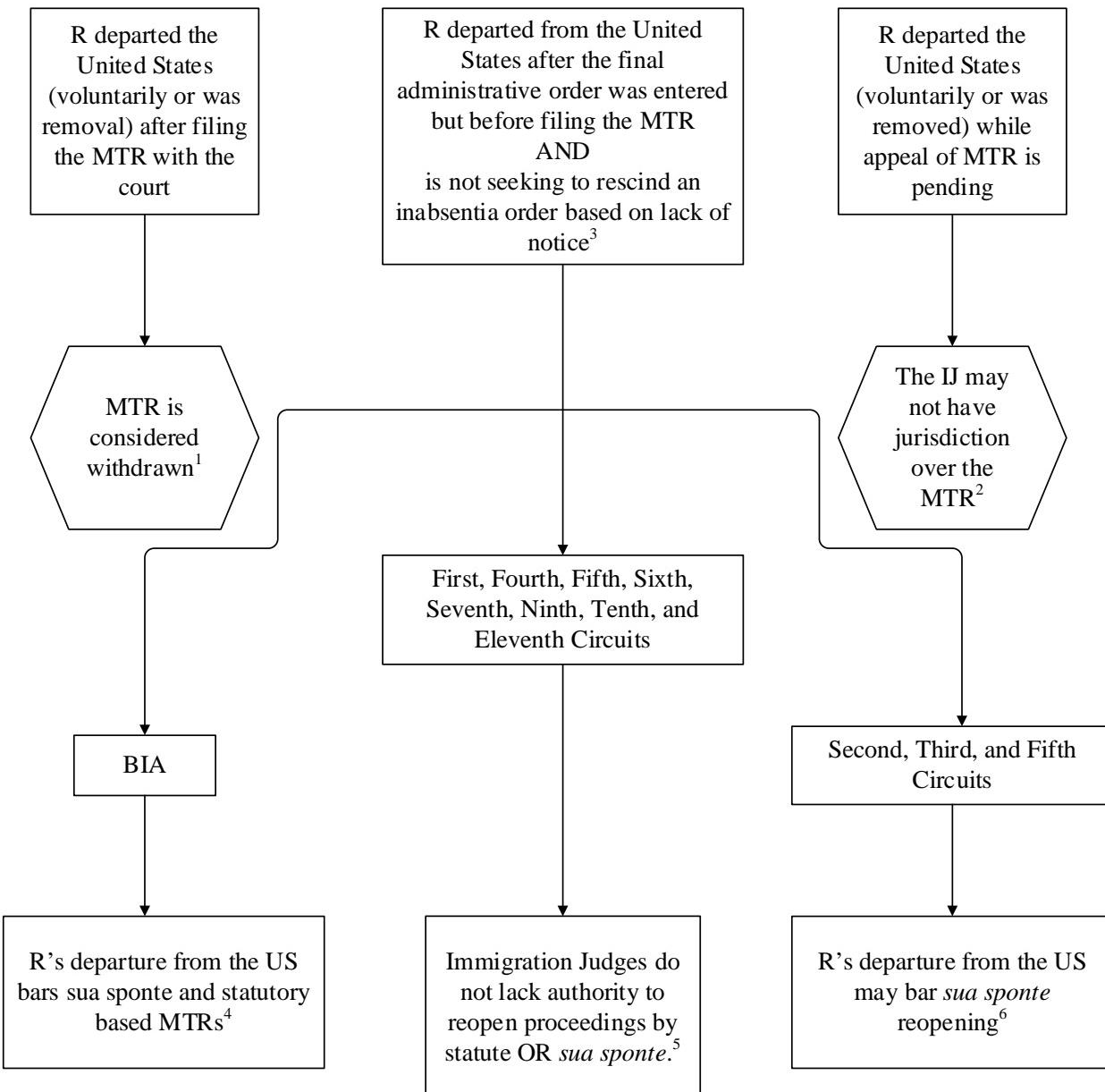


Chart 5

Continue here if the respondent departed the United States after receiving a final order



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Laura Robbins

Attorney, OCIJ

FN 1 A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion. 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

FN 2 Departure from the United States of a person who is the subject of deportation or removal proceedings . . . subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken. 8 C.F.R. § 1003.4

The Sixth and Ninth Circuits have not applied this provision to those who are involuntarily removed from the country pending an appeal. *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009); *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003).

FN 3 The BIA has held that the 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) do not apply to motion to reopen *in absentia* orders based on lack of notice. *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009).

FN 4 The Board construed 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) to mean that the Board and Immigration Judges lack authority to reopen proceedings, either by motion or *sua sponte*, after the alien has left the United States. *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008).

FN 5 Most circuit courts of appeals have rejected the Board's decision in *Matter of Armendarez-Mendez*, and have held that the regulatory departure bar does not eliminate an alien's statutory right to file a motion to reopen or the judge's authority to issue *sua sponte* reopening. See *Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Toor v. Lynch*, 789 F.3d 1055 (9th Cir. 2015); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012); *Jian Le Lin, v. Att'y Gen. of the U.S.*, 681 F.3d 1236 (11th Cir. 2012) (en banc).

FN 6 The Second, Third, and Fifth Circuits have upheld 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) in the context of *sua sponte* motions to reopen. *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Desai v. U.S. AG of the United States*, 695 F.3d 267 (3d Cir. 2012); *Ovalles v. Holder*, 577 F.3d 288, 300 (5th Cir. 2009).